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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-322

CRAWFORD FITTING COMPANY,
CAPITAL VALVE & FITTING COMPANY, INC.,
THOMAS A. READ & COMPANY,
FRED A. LENNON and ROBERT D. JENNINGS,
Petitioners,

v.

J.T. GIBBONS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENT

INTRODUCTION

At issue here is whether district courts have discretion to award expert witness fees in excess of those allowed by 28 U.S.C. § 1821. This issue was definitively answered in *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 284 U.S. 244 (1932), where this Court held that:

> Specific provision as to the amounts payable and taxable as witness fees was made by the Congress as

> early as the Act of February 28, 1799, c. 19, § 6, 1 Stat. 624, 626. *See also*, Act of February 26, 1853, c. 80, § 3, 10 Stat. 161, 167; Rev. Stat. § 848. The statute now applicable is the Act of April 26, 1926, c. 183, 44 Stat. 323. U.S.C. Tit. 28, §§ 600a to 600d. *Under these provisions, additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed as costs in cases in the federal courts.*

284 U.S. at 446 (emphasis added) (citations omitted), and that:

> The Congress has dealt with the subject comprehensively and has made no exception of the fees of expert witnesses.

284 U.S. at 447.

Petitioners' only argument is that the statute allegedly failed to regulate the award of costs under equity practice, and that the adoption of Federal Rule of Civil Procedure 54(d) granted federal courts these alleged equity powers to award expert witness fees in excess of the statutory allowance.

There are four basic problems with petitioners' argument: (1) it is contrary to the terms of the statute, which from its inception expressly regulated equity courts as well as law courts; (2) it is directly contrary to the case law of equity courts, holding expert witness fees not recoverable in excess of the statutory amounts; (3) it is rejected by *Henkel*, which relied on equity cases in holding expert witness fees not recoverable in excess of the statutory amounts; and (4) it is contrary to this Court's ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), interpreting the same statute and issue presented here.

Congress has repeatedly relied on its ability to pick and choose which cases may include an award of expert

witness fees and which may not.[1] Judicial legislation of a different rule, after 130 years of congressional reliance on congressional control, would substantially disrupt many carefully crafted statutes. Nor is such judicial legislation necessary; where a party believes recovery of expert witness fees is essential, the party may apply for court appointment of the expert, which can provide the requisite authority for taxation of the expert's fees as costs. For these reasons, the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

STATEMENT OF THE CASE

Plaintiff/Respondent J.T. Gibbons, Inc. is a distributor of pipe fittings for oil rigs. Defendants/Petitioners are the company that manufactures those fittings (Crawford Fitting Company), Crawford's owner (Fred A. Lennon), two companies that distribute the fittings (Capital Valve & Fitting Company, Inc. and Thomas Read & Company), and Capital's owner (Robert D. Jennings).

In 1977, Gibbons began selling Crawford fittings, which it acquired through Capital and sold in Scotland. Gibbons' sales competed with sales made by Crawford distributors in Scotland. In 1978, Capital refused to sell any more products to Gibbons. When Gibbons approached Read, Read also refused to deal. After unsuccessful negotiations, Gibbons brought suit against petitioners for breaches of federal antitrust laws. *See J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 704 F.2d 787, 789-90 (5th Cir. 1983).

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[1] Thus, for example, respondent in *Champion International Corp. v. International Woodworkers of America*, No. 86-328, consolidated with this case for argument, will argue that the Civil Rights Act of 1964 and the Civil Rights Attorneys' Fees Act of 1976 authorize a prevailing civil rights plaintiff (but not defendant) to recover expert witness fees. This case, however, involves an antitrust defendant who has no right to recover any costs or fees beyond those authorized by the general cost statutes.

The suit alleged violations of 15 U.S.C. §§ 1 and 2. It claimed that: (1) defendants' refusal to deal constituted an unreasonable restraint of trade; (2) all defendants conspired to eliminate Gibbons' competition in the North Sea market; (3) Crawford set resale prices for its distributors; and (4) Crawford's subsidiary and manufacturing companies engaged in horizontal price fixing. *See J.T. Gibbons, Inc.*, 704 F.2d at 790. Petitioners counterclaimed for malicious prosecution. *Id.*

At the close of trial, the trial court directed a verdict against Gibbons on its antitrust claims. Petitioners' claim of malicious prosecution was allowed to go to the jury, which returned a verdict finding that Gibbons' suit was not malicious prosecution. *See J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 565 F. Supp. 167 (E.D. La. 1981).

On appeal to a panel of the Fifth Circuit, the court of appeals affirmed the directed verdict on the antitrust claims, assuming that violations had occurred but finding that Gibbons had failed to prove damages. *See J.T. Gibbons, Inc.*, 704 F.2d at 792 ("We have assumed for purposes of this discussion, that the defendants did in fact conspire to eliminate Gibbons' competition."). It also affirmed the jury's verdict denying the malicious prosecution claim. *Id.* at 799.

Following the affirmance, petitioners presented a bill of costs to the district court, including a claim for expert witness fees. The antitrust attorneys' fee statute, 15 U.S.C. § 15, allows awards only to prevailing plaintiffs. Thus, petitioners, as antitrust defendants, had no claim for costs outside those allowed in the general cost statutes, 28 U.S.C. §§ 1821 and 1920. The district court, however, awarded petitioners approximately $87,000 in expert witness fees. *J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 102 F.R.D. 73 (E.D. La. 1984); Petn. at 13a-45a.

On appeal, the issue presented was whether a district court may award as costs expert witness fees in excess of the amounts specified in 28 U.S.C. § 1821. The court of appeals followed the rule established in *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 284 U.S. 444 (1932), held the expert witness fees not recoverable in excess of the statutory amounts, and remanded with instructions to recalculate the witness fees in accordance with 28 U.S.C. § 1821. *J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 760 F.2d 613 (5th Cir. 1985); Petn. at 5a-12a. A petition for certiorari was filed by Crawford *et al.*, Supreme Court No. 85-248, but the Fifth Circuit subsequently *sua sponte* granted rehearing *en banc* and the petition was dismissed pursuant to Supreme Court Rule 53. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, —— U.S. ——, 186 S.Ct. 568, 88 L. Ed. 2d 182 (1985).

On rehearing *en banc*, the *en banc* court reached the same result, holding that district courts may not violate the restrictions of 28 U.S.C. § 1821 in awarding expert witness fees. *J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 790 F.2d 1193 (5th Cir. 1986) (*en banc*); Petn. at 1a-4a. A petition for certiorari was filed, and certiorari was granted, —— U.S. ——, 93 L. Ed. 2d 573 (1986).

SUMMARY OF ARGUMENT

The law on this issue has long been settled. Part I *infra*. The Fee Act of 1853, 10 Stat. 161 *et seq.* (the "Fee Act"), specified the amount of witness fees that may be awarded as costs, and explicitly provided that "no other compensation shall be taxed or allowed." The Fee Act by its terms applied to all cases, including law, equity, and admiralty. The provisions of the Fee Act have been reenacted without substantive change into their present codification as 28 U.S.C. §§ 1821 and 1920 and Federal Rule of Civil Procedure 54(d). These provisions, like the Fee Act, do not permit the taxation of

expert witness fees beyond the statutorily-prescribed amounts. Part I(A) *infra.*

Equity practice (on which petitioners rely) specifically held that in equity cases expert witness fees may not be taxed beyond the amounts set by statute. Part I(B) *infra.*

This Court in *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 284 U.S. 244 (1932), expressly held that expert witness fees may not be awarded beyond those set forth in the statute, and cited in reliance equity cases so holding. Part I(C) *infra.*

The intent of the Fee Act was reaffirmed by this Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which held that costs "between solicitor and client" (which category includes attorneys' fees and expert witness fees) may not be recovered in excess of the Fee Act's statutorily-defined amounts. As *Alyeska* explained, the power of courts to award costs between solicitor and client is limited to: (1) awards out of a common fund created by the actions of the prevailing party; (2) awards made because the losing party has wilfully disobeyed a court order; and (3) awards made because the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons; none of which is present here. Part I(D) *infra.*

None of petitioners' attempts to avoid the settled law has any basis. Part I(E) *infra.*

Congress has relied on its ability to control the award of expert witness fees. It has chosen certain instances in which to permit such awards by special statutory enactment, and has declined to so provide in other instances. Judicial legislation creating judicial discretion to make such awards would substantially disrupt many carefully considered congressional decisions. Part II *infra.*

Such judicial legislation is totally unnecessary. If a party wishes to provide for the recoverability of expert witness fees as costs, he or she should apply for prior court appointment of the expert under Federal Rule of Evidence 706 and 28 U.S.C. § 1920(6), which provide for the award of court-appointed expert's fees as costs. Part III *infra.*

Petitioners' policy request for judicial legislation is one that has repeatedly been rejected by this Court. Petitioners' arguments must be made to Congress, not this Court. Part IV *infra.*

ARGUMENT

I. THE LAW GOVERNING AWARDS OF EXPERT WITNESS FEES HAS LONG BEEN SETTLED.

A. The Fee Act of 1853 Prescribes Witness Fees for All Cases.

The history of cost statutes in the United States is discussed in detail in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247-62 (1975). For the purposes of this case, it is sufficient to start with the Fee Act of 1853, 10 Stat. 161-69, in which, as *Alyeska* explained:

> Congress undertook to standardize the costs allowable in federal litigation [and] the result was a far-reaching Act specifying in detail the nature and amount of the taxable items of cost in the federal courts.

Alyeska, 421 U.S. at 251-52.

The Fee Act prescribed precisely and in all instances what fees could be awarded as costs in courts of the United States:

> [I]n lieu of the compensation now allowed by law to attorneys, solicitors, and proctors in the United States courts, the United States district attorneys,

> clerks of the district and circuit courts, marshals, witnesses, jurors, commissioners, and printers, in the several States, *the following and no other compensation shall be taxed and allowed.*

10 Stat. 161 (emphasis added).

The Fee Act by its terms regulated all cases in the United States courts. Certain provisions, such as those for witness fees, applied to all types of cases, while others distinguished among cases in law, equity, and admiralty. Thus, for example, the Fee Act provided for a fee for entry upon the final record of process, pleadings, and decrees in equity and admiralty causes only. *See* 10 Stat. 163. Similarly, one docket fee was allowed for law, equity, and admiralty cases generally, and a different docket fee was provided for admiralty cases when the libellant's recovery was less than $50.00 *See* 10 Stat. 161-62.

With respect to witnesses, in all cases, the Act provided:

> *Witnesses' Fees.* For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents per mile for travelling from his place of residence to said place of trial or hearing, and five cents per mile for returning.

10 Stat. 167.

As explained in *Alyeska*, the Fee Act was carried forward in the Revised Statutes of 1874, *see* Rev. Stat. §§ 823, 848, and in the Judicial Code of 1911, Judicial Code of 1911 § 297, 36 Stat. 1169, codified as 28 U.S.C. ¶¶ 600, 601. Its substance, without any intent to change the controlling rules, was included in the Revised Code of 1948 as 28 U.S.C. §§ 1920 and 1821. *Alyeska*, 421 U.S. at 255-56 & n.29.[2]

[2] As noted in *Alyeska*, the 1948 Code does not contain the language used in the Fee Act and carried on for nearly 100 years that the fees prescribed in the statute "and no other compensation shall be taxed and allowed," but Congress clearly did not intend any substantive change in not including that language, and no substantive change should be inferred. *See Alyeska*, 421 U.S. at 255-56 n.29 and authorities cited therein. Indeed, in the codification the relevant language (previously contained in Revised Statutes Section 571) is not even listed as "omitted", and the new Section 1821 is specifically described as applying "to witnesses . . . in all United States Courts." *See* House Rept. 80-308 at A-237 (1947).

Over the years, Congress has passed special statutes permitting the award of expert witness fees in special circumstances (*e.g.*, Federal Rule of Evidence 706 and 28 U.S.C. § 1920(6) allowing taxation of court-appointed experts' fees). *See* Part II *infra*. The only change in the general Fee Act provisions, however, has been the adoption of Federal Rule of Civil Procedure 54(d) and amendment of 28 U.S.C. § 1920 to permit the denial (not the increase) of statutorily-authorized fees.

Equity courts had always had the power to deny otherwise awardable fees (although not to increase fees beyond statutorily-defined amounts). *See Cheatham Electric Switching Device Co. v. Transit Development Co.*, 261 F. 792, 796 (2d Cir. 1919); *Bone v. Walsh Construction Co.*, 235 F. 901, 902 (S.D. Iowa 1916). In 1937, this equity power was explicitly adopted by Federal Rule of Civil Procedure 54(d), which provided that costs "shall be allowed as of course to the prevailing party . . . unless the court otherwise directs." In 1946, 28 U.S.C. § 1920 changed its authorization for an award of costs from a mandatory "shall tax as costs" to a discretionary "may tax as costs" to reflect the discretion to deny costs granted by Federal Rule of Civil Procedure 54(d). *See* note following 28 U.S.C. § 1920 (Supp. II, 1946); *Alyeska*, 421 U.S. at 256 n.29.

In short, Congress has, since 1853, regulated the maximum amounts that may be taxed as costs by federal courts for compensation of witnesses. By its terms, the Fee Act applies to all witnesses and to all cases. Con-

gress has at all times been clear in its intent and, indeed, the courts have consistently held that they are bound by the Fee Act in all cases, including equity cases.

B. Equity Practice Specifically Recognized that Expert Witness Fees Are Not Recoverable in Excess of Those Set Forth in the Fee Act.

Petitioners' argument is based entirely upon the premise that equity courts somehow had the power to award expert witness fees in excess of those allowed by the Fee Act. Petitioners, however, cite no case so holding, as indeed they cannot. Equity courts were quite clear on the matter. In the equity case of *Bone v. Walsh Construction Company*, 235 F. 901 (S.D. Iowa 1916), the court was confronted "with the question as to whether or not, in the absence of a statute, the expense for experts in the preparation of a case, and in attendance for the trial, aside from statutory witness fees, can be allowed as costs, either upon dismissal, or upon final decree." *Id.* at 903. The court explained that the powers of equity with regard to the award of costs lay in the ability to apportion them among the parties or reduce the amount authorized by statute, but did not extend to awarding costs in excess of those set forth by statute:

> While there are general expressions that a court of equity has broad powers in the matter of taxation of costs, it will be found, upon examination of these cases, that these expressions relate largely to the apportionment of costs, or to the amount which may be allowed as costs under specific provisions of the statute; but I find no case which specifically holds that a court of equity has power to determine what costs are assessable.

Bone, 235 F. at 902. The court concluded, with extensive citation of authority, that expert witness fees may not be awarded in excess of those permitted by statute. *See id.* at 904.

Cheatham Electric Switching Device Co. v. Transit Development Co., 261 F. 792 (2d Cir. 1919) is similarly on point. *Cheatham Electric* was a bill in equity. *See id.* at 793. The defendant, having been adjudged entitled to costs, requested expert witness fees. Again recognizing that an equity court has discretion to deny otherwise taxable costs, the court held that courts in equity may not, however, exceed the statutory authorizations, and expert witness fees are not among those costs authorized by statute:

> The question of costs first above referred to is this: defendants have twice paid an expert witness a considerable fee, in order that he might testify in the long series of litigations between these parties. It is urged that defendants should be permitted to tax the expert's fee on his second appearance as a disbursement. Allowance of costs, etc., in equity is discretionary, but definition of costs and taxable disbursements is a matter settled by statute or rule or authority, and we hold that expert's fees as witnesses are not legally taxable as costs or disbursements. Ordinary witness fees are taxable under the statute to be sure, but on the theory that the law requires the witness to attend and speak. An expert sells his opinion, as counsel sells his services, and he cannot by law be compelled to testify at all, while an attorney may be compelled to serve. There is considerably less reason for taxing experts' fees than might be urged for taxing the expense of legal counsel.

Id. at 796. *See also, e.g., In re First Bond & Mortgage Co.*, 74 F.2d 930, 932 (5th Cir. 1935); *In re Hines*, 144 F. 147, 150 (D. Ore. 1906); (both holding that Bankruptcy Rule 34, which allowed taxation of "the same costs that are allowed to a party recovering in a suit in equity" did not allow taxation of expert witness fees). *See generally, McIntosh v. Ward*, 159 F. 66, 69 (7th Cir. 1907) ("[T]he discretion of a court of equity does not authorize it to require one party . . . to pay the

other, under the name of costs, items paid from the fund for services and expenses in administering a fund properly in court, nor any other items not within the fee-bill act.").

To the same effect, in other non-law cases, are, *e.g.*, *In re Carolina Cooperage Co.*, 96 F. 604 (E.D. N.C. 1899) ("Extra allowance to expert witnesses fees cannot be allowed or taxed against a losing party in a United States district court sitting in admiralty or bankruptcy, but must be paid, according to the statute, $1.50 per day for actual attendance, and mileage.") (bankruptcy); *The William Branfoot*, 52 F. 390, 395 (4th Cir. 1892) (admiralty).

In short, the courts of the United States were never confused about the intent of the Fee Act of 1853. It was intended to regulate the fees that could be taxed as costs for all witnesses in all cases. Equity courts retained their historic discretion to deny or reapportion costs according to the merits of a case, but they had no authority to award expert witness fees in excess of the fees allowed by statute.

C. The Issue in the Present Case Was Squarely Decided in *Henkel*.

In *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 284 U.S. 444 (1932), the Court considered an attempt to avoid the restrictions of the Fee Act of 1853. The case was brought in federal court under the Federal Employers' Liability Act to recover damages for the death of the plaintiff's intestate. Upon obtaining a verdict, the plaintiff asked for an order allowing fees for expert witnesses who had testified at trial. The plaintiff argued that fees could be awarded under Minnesota statutes, and sought to invoke the provision of the Rules of Decision Act, 28 U.S.C. § 725 (current version at 28 U.S.C. § 1652), that:

> The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States in cases where they apply.

The court of appeals, uncertain as to the answer on this issue, certified the question:

> Has a United States District Court power and authority to allow expert witness fees, and to include the same as part of the taxable costs in a law case, said United States District Court being for and sitting in a State the Courts of which are by a state statute authorized, in their discretion, to allow expert witness fees, and the practice and usage in said state courts being to make such allowance and to include the same in the taxable costs, but there being no such usage and practice in said United States District Court?

Henkel, 284 U.S. at 445.

This Court held that 28 U.S.C. § 725 was, by its terms, inapplicable:

> [T]he Congress has definitely prescribed its own requirement with respect to the fees of witnesses. The Congress has dealt with the subject comprehensively and has made no exception of the fees of expert witnesses. Its legislation must be deemed controlling and excludes the application in the federal courts of any different state practice.

Henkel, 284 U.S. at 447 (citations omitted).

Citing to the Fee Act, as then codified in 28 U.S.C. §§ 600a-600d, the Court held that expert witness fees may not be taxed as costs in excess of the amounts allowed by statute:

> Under these provisions, additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed as costs in cases in the federal

courts. The *William Branfoot*, 52 F. 390, 395; *In re Carolina Cooperage Co.*, 96 F. 604, 605; *Bone v. Walsh Construction Co.*, 235 F. 901, 903, 904; *Cheatham Electric Co. v. Transit Development Co.*, 261 F. 792, 796.

Henkel, 284 U.S. at 446.

The cases cited for this controlling rule are perhaps familiar. The previous section discussed the holdings of equity courts that expert witness fees may not be taxed in excess of those allowed by the Fee Act of 1853. Those cases included *Bone v. Walsh Construction Co.* and *Cheatham Electric Co. v. Transit Development Co.* These are the very same cases cited by *Henkel* in support of its interpretation of the statute. Indeed, *Henkel* does not cite a single law case for its proposition, but only cases from admiralty, equity, and bankruptcy. Had there been any question in the Court's mind as to the scope of the congressional intent of the Fee Act and its subsequent codifications, the authorities cited would undoubtedly have been different.

In short, this Court in *Henkel* addressed in 1932 the same question that is before the Court today. The Court held, unequivocally, that Congress intended to regulate the fees of expert witnesses and that federal courts are not free to ignore that regulation. In so doing, this Court cited with approval and relied upon cases holding that the equity powers of federal courts provide no different rule. The only development in this area since *Henkel* has been Congress' repeated reliance upon its ability to pick and choose which statutes shall specially provide for expert witness fees and which shall not. *See* Part II *infra*. That development is cause for reaffirmation of *Henkel*, not its rejection.

D. The Rule of *Henkel* Was Reaffirmed in *Alyeska Pipeline Service Co. v. Wilderness Society.*

The intent and effect of the Fee Act was reviewed in detail in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). At issue in that case was the award of counsel fees, as opposed to expert witness fees, but as they were both treated alike under the same statute, and had merely had their provisions spun out into different sections of Title 28, there is no valid ground for distinction. Indeed, unlike most of the other fees regulated by the Fee Act and its subsequent embodiments, counsel fees and expert witness fees were both what was known at common law as "costs between solicitor and client," which were generally not taxable, as opposed to costs "between party and party" (such as docket fees) which generally were taxable. Thus, going back to the very origin of the concept of taxation of costs, attorneys' fees and expert witness fees have always been treated alike.

As found by *Alyeska*, the 1853 Act "specif[ied] in detail the nature and amount of the taxable items of cost in the federal courts." *Alyeska*, 421 U.S. at 252. The Fee Act did not permit the taxing of excess "solicitor and client" costs. *Id.* at 258 n.30. Congress has not since "retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors." *Id.* at 260. Just as Congress in the Fee Act extended no "roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted," *id.* at 260, so too Congress has extended no "roving authority" to allow expert witness fees in excess of the amount specifically provided for by statute.

Alyeska also recognized three limited exceptions, relating to protection of a common fund and of the court's process, under which costs "between solicitor and client" might be recovered. As the Court explained, those ex-

ceptions are limited to: (1) recovery from a common fund of the costs of a party preserving or recovering that fund; (2) as a penalty for willful disobedience of a court order; and (3) where the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Alyeska*, 421 U.S. at 257-59.

All of the arguments made here were addressed in *Alyeska* and rejected. None of the limited exceptions recognized in *Alyeska* is applicable here.[3] For all the reasons stated in *Alyeska*, the Fifth Circuit was correct in its holding in this case.

E. None of Petitioners' Attempts to Avoid Settled Law Has Any Basis.

The main argument made by petitioners in this case is that equity courts had some type of undefined power to tax expert witness fees as costs in excess of those allowed by statute, that *Henkel* is somehow distinguishable on that basis, and that Federal Rule of Civil Procedure 54(d) obviates the holding of *Henkel* by awarding this alleged equity power to federal courts.

All of those arguments have been shown conclusively to be unfounded in previous sections of this brief. The Fee Act specifically covered both law and equity; the equity courts repeatedly recognized that fact; *Henkel* not only recognized that fact, it relied on equity cases for its holding; and Rule 54(d) modified the rules as to the award of fees only by adopting the equity discretion to deny fees otherwise awardable, not by importing any alleged right to expand the scope of awardable fees.

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[3] Notwithstanding petitioners' attempt to color this case by arguing that the action was vexatious, that issue was tried to a jury, which found in favor of respondent. The trial court declined to award costs based on any such theory, the court of appeals declined to award costs based on any such theory, and there is certainly no cause for this Court to find such an exception applicable.

Petitioners do not cite a single equity case in which expert witness fees were ever awarded. Nor do any of the cases they do cite provide any support for their argument. *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), on which they primarily rely, was a "common fund" case, and *Alyeska* expressly so holds. *See Alyeska*, 421 U.S. at 257-58 and n.30.

Newton v. Consolidated Gas Co. of New York, 265 U.S. 78 (1924), was a diversity case[4] in which a bond premium used to create a common fund was held recoverable because it was not otherwise regulated by statute and was recoverable under the usage in the district. Here, of course, the case is not a diversity case, and the award is specifically regulated by statute.

Ex parte Peterson, 253 U.S. 300 (1920), was another diversity case, involving the court's appointment of an auditor to assist the court. The Court held that the cost of an auditor appointed by the court to assist the court is substantively different from expenditures made for the benefit of the parties, *id.* at 316, and that neither the Fee Act of 1853 nor state law (because it was a diversity case) regulated in any way the taxing of the cost of a court-appointed auditor. *Id.* at 317. In the absence of any statutorily-defined amount, the Court held that the fee of a court-appointed auditor could be taxed and apportioned as the court saw fit.

Far from supporting petitioners, *Ex Parte Peterson* defeats their arguments. Here the case is brought under a federal statute, and the Fee Act unquestionably (by its terms and by this Court's holdings) regulates the amount of private expert witness fees that may be taxed as costs. Indeed, *Henkel*, ruling that Congress had definitively regulated the taxation of private expert witness fees, was decided 12 years after *Ex Parte Peterson*, and controls on

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[4] As stated in *Alyeska*, diversity cases are not controlled by the federal costs statute. *See Alyeska*, 421 U.S. at 259 n.31.

the question whether the fees of expert witnesses (as opposed to court-appointed auditors) are controlled by the Fee Act. As the Seventh Circuit explained in *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 801 F.2d 908, 910-11 (7th Cir. 1986):

> [W]hile Rule 54(d) may conceivably allow the taxation as costs of items omitted by Congress, perhaps inadvertently, from sections 1821 or 1920, witness fees are not an omitted item; they are provided for expressly in both sections. Section 1920 even contains an express provision on expert-witness fees, though not one of which SGE can avail itself.[5]

For all these reasons, *Ex Parte Peterson* provides no support here.

Similarly, *F.D. Rich Co., Inc. v. United States*, 417 U.S. 116 (1974), far from providing support for petitioners' position, undercuts it. As the court held in *F.D. Rich Co.*:

> The perspectives of the profession, the consumers of legal services, and other interested groups should be weighed in any decision to substantially undercut application of the American Rule in such litigation. Congress is aware of the issue. Thus whatever the merits of arguments for a further departure from the American Rule in Miller Act commercial litigation, *those arguments are properly addressed to Congress.*

417 U.S. at 131 (emphasis added). *Accord, Roadway Express, Inc. v. Piper*, 447 U.S. 752, 761 (1980) ("Without any evidence that Congress wished to alter the uniform structure established by the 1853 Act, we are reluctant to disrupt it.").

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[5] The express provision referred to is 28 U.S.C. § 1920(6), implementing Federal Rule of Evidence 706, which allows the taxation of the fees of court-appointed experts "in whatever sum the court may allow." In adopting these provisions, however, Congress clearly chose not to modify the prescribed private expert witness fees of 28 U.S.C. § 1821.

With regard to the various court of appeals cases cited by respondents, many involve the specific statutory authority of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), and the Civil Rights Attorneys' Fee Act of 1976, 42 U.S.C. § 1988, and are simply inapplicable here. The others cannot stand in light of the Fee Act, *Henkel*, and *Alyeska*. Further, those cases are substantially outweighed by the nine circuits that follow *Henkel*.[6]

The only other case relied on by petitioners is *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964). Not even the most twisted reading of *Farmer*, however, can suggest that it overrules or modifies *Henkel* or undercuts *Alyeska*.

In *Farmer*, a party voluntarily transported witnesses from Arabia. Upon prevailing, that party asked for the cost of such transportation under 28 U.S.C. § 1821, which on its face allowed taxation of such costs: "witnesses who are required to travel . . . to and from the continental United States, shall be entitled to the actual expenses of travel." *See Farmer*, 379 U.S. at 322.

Under the statute, the prevailing party was entitled to taxation of costs in the amount of the travel expense

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[6] *See*, in order according to circuit, *Templeman v. Chris Craft Corp.*, 770 F.2d 245, 250 (1st Cir. 1985); *Bosse v. Litton Unit Handling Systems*, 646 F.2d 689, 695 (1st Cir. 1981); *In re Air Crash*, 687 F.2d 626, 631 (2d Cir. 1982); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 n.75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Wheeler v. Durham City Board of Education*, 585 F.2d 618, 624 (4th Cir. 1978); *Specialty Equipment & Machinery Corp. v. Zell Motor Car Co.*, 193 F.2d 515, 521 (4th Cir. 1952); *J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 790 F.2d 1193 (5th Cir. 1986); *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975); *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 801 F.2d 908 (7th Cir. 1986); *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358, 1363 (10th Cir. 1979), *cert. denied*, 446 U.S. 909 (1980); *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1526 (11th Cir. 1985); *Kivi v. Nationwide Mutual Insurance Co.*, 695 F.2d 1285, 1289 (11th Cir. 1983); *Quy v. Air America, Inc.*, 667 F.2d 1059, 1066-67 (D.C. Cir. 1981).

from Arabia. Courts, however, had put a gloss on 28 U.S.C. § 1821, holding that where witnesses were imported without prior court authority from beyond the 100 mile mandatory subpoena radius of Federal Rule of Civil Procedure 45(e), the court would not allow travel expenses beyond the cost of going 100 miles. *See* cases cited in *Farmer v. Arabian American Oil Co.*, 324 F.2d 359, 362, 366 (2d Cir. 1963).

Judge Weinfeld followed this rule, exercising his discretion under Rule 54(d) to *refuse* to tax the travel costs even though they were permitted on the face of 28 U.S.C. § 1821:

> Judge Weinfeld "in the exercise of discretion" refused to tax the actual transportation expenses of the witnesses from Arabia, limiting those costs to the per diem fees fixed by law and to expenses for travel for a distance not to exceed 100 miles to and from the courthouse.

Farmer, 379 U.S. at 234.

In upholding Judge Weinfeld's exercise of discretion, the Court merely stated that he was authorized to look to the 100-mile rule gloss on § 1821 in *declining* to tax travel costs that were otherwise apparently authorized by statute:

> We cannot accept either the extreme position of the company that the old 100-mile rule has no vitality for any purpose or Farmer's argument that a federal district court can never under any circumstances tax as costs expenses for transporting witnesses more than 100 miles. In this case, however, where taxation of such expenses is being denied, we need not set out the specific circumstances under which such costs can be taxed nor mark precisely the limits of a district court's power to tax them.

Farmer, 379 U.S. at 232. As discussed in Part I(B), *supra*, equity courts have always had discretion to decline to tax costs or to reapportion statutory costs, but equity courts have never had the power to increase costs

beyond the statutorily provided amounts. *Farmer* approves Judge Weinfeld's exercise of the traditional power to decline to tax costs, as specifically incorporated in Rule 54(d) ("costs shall be allowed as of course . . . unless the court otherwise directs"). Nothing in the case suggests that the court has any power to increase the costs beyond the statutory limits.

II. CONGRESS HAS RELIED ON ITS ABILITY TO CONTROL AWARDS OF EXPERT WITNESS FEES.

The words of this Court in *Alyeska*, describing congressional reliance upon control of awards of costs between solicitor and client, could have been written for this case: "Congress has not repudiated the judicially fashioned [common fund and bad faith] exceptions to the general rule against allowing substantial attorneys' fees; but neither has it retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors. Nor has it extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted. What Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights. These statutory allowances are now available in a variety of circumstances, but they also differ considerably among themselves. . . . Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Alyeska*, 421 U.S. at 260-62 (footnotes omitted).

Congress' reliance upon its ability to control the award of expert witness fees is evident throughout the United States Code. One of the most striking examples, of course, is the fact that Congress has expressly provided

for the award of expert witness fees in the limited circumstances where there has been prior court approval and appointment. 28 U.S.C. § 1920(6); Federal Rule of Evidence 706. As the Seventh Circuit explained in *State of Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 865 (7th Cir. 1981):

> Congress made no special provision for a private party's witnesses who are classified as expert witnesse.. But Congress did specify that costs include the expense of court-appointed expert witnesses. 28 U.S.C. § 1920(6). We conclude that congressional silence regarding privately retained expert witnesses means that expenses incurred by private parties to retain expert witnesses are recoverable as costs under § 1920 only to the extent specified in § 1821.

Another striking example is found in the Equal Justice Act, 28 U.S.C. §§ 2401 *et seq.*, which provides that in suits against the United States: "a judgment for costs, as enumerated in section 1920 of this title" may be taxed against the United States. 28 U.S.C. § 2412(a). In so providing, however, Congress clearly understood and relied on the fact that § 1920 costs do not include private expert witness fees in excess of the amount set forth in § 1821. Recognizing that such statutory costs do not include expert witness fees, Congress has further provided that a party prevailing against the United States can recover "*in addition to*" the costs enumerated in § 1920 "fees and other expenses . . . [including] the reasonable expenses of expert witnesses." 28 U.S.C. § 2412 (d)(1)(A) and (d)(2)(A) (emphasis added). Congress thus reaffirmed its intent and understanding that authorization in addition to 28 U.S.C. §§ 1920 and 1821 is required before private expert witness expenses may be taxed.

Nor are these the only examples. In at least 34 provisions in 29 separate statutes, Congress has chosen to specify that under certain statutorily-defined circum-

stances litigants (often, however, only prevailing plaintiffs) may recover expert witness fees in addition to the costs normally recoverable in a civil action. *See* Administrative Procedure Act, 5 U.S.C. § 504(b)(1)(A); Consumer Product Safety Act, 15 U.S.C. §§ 2060(c), 2072 (a), 2073; Toxic Substances Control Act, 15 U.S.C. §§ 2618(d), 2619(c)(2), 2620(b)(4)(C); Petroleum Marketing Practices Act, 15 U.S.C. § 2805(d)(1)(C) (3), (d)(3); National Historic Preservation Act Amendments of 1980, 16 U.S.C. § 470w-4; Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4); Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2632(a) (1), (b)(2); Tax Equity and Fiscal Responsibility Act of 1982, 26 U.S.C. § 7430(a), (c)(1)(A)(ii); Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c); Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1734(a)(4); Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 928(d); Federal Water Pollution Control Act, 33 U.S.C. § 1365(d); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4); Deepwater Ports Act of 1974, 33 U.S.C. § 1515(d); Act to Prevent Pollution from Ships, 33 U.S.C. § 1910(d); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d); Noise Control Act of 1972, 42 U.S.C. § 4911(d); Energy Reorganization Act of 1974, 42 U.S.C. § 5851(e)(2); Energy Policy and Conservation Act, 42 U.S.C. § 6305(d); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(e); Clean Air Act, 42 U.S.C. §§ 7413(b), 7604 (d), 7607(f); Clean Air Act Amendments of 1977, 42 U.S.C. § 7622(b)(1)(B), (e)(2); Power Plant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8435(d); Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. § 9124(d); Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1349(a)(5); Natural Gas Pipeline Safety Act, 49 U.S.C. § 1686(e); Hazard-

ous Liquid Pipeline Safety Act of 1979, 49 U.S.C. § 2014(e).[7]

A judicially-legislated exception to the rule of congressional control would substantially disrupt these statutory schemes. The situation of respondent Gibbons is a prime example. Gibbons is an antitrust plaintiff. Congress has been quite explicit from the very beginning of the antitrust laws that a prevailing antitrust plaintiff, but *not* a prevailing antitrust defendant, shall be entitled to recover its attorneys' fees and costs. *See* 15 U.S.C. § 15. Even this statutory provision has always been held insufficient to grant even a prevailing plaintiff the right to recover expert witness fees. *See Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 81 (2d Cir. 1971), *rev'd on other grounds, sub nom. Hughes Tool Co. v. TWA*, 409 U.S. 363 (1973), and cases cited therein; *State of Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 866 (7th Cir. 1981); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 n.75 (2d Cir. 1979); *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975); *Twentieth Century Fox v. Goodwin*, 328 F.2d 190, 224 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964).

Congress has reviewed the antitrust laws as much as any laws on the books, and has never seen fit to change this deliberate allocation of costs and risks. Congress' fee allocation decision is a well-considered one, designed to encourage plaintiffs and thus discourage anti-competitive behavior. *See Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1312 (9th Cir. 1982); *Knutson v. Daily Review, Inc.*, 479 F.Supp. 1263, 1267 (N.D. Cal. 1979). Judicial legislation revising Congress' decision would be an unwarranted intrusion into congressional policy making. Again, the words of *Alyeska* are particularly apposite:

[7] Respondent in *Champion International*, No. 86-328, will discuss the fact that The Civil Rights Act of 1964 and The Civil Rights Attorneys' Fee Act of 1976 also provide for the recovery of expert witness fees by prevailing plaintiffs.

> We need labor the matter no further. It appears to us that the rule suggested here . . . would make major inroads on a policy matter that Congress has reserved for itself. Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation . . . .

Alyeska, 421 U.S. at 269.

III. JUDICIAL LEGISLATION AMENDING CONGRESSIONAL POLICY ON EXPERT WITNESS FEES IS UNNECESSARY.

Not only is the rule requested by petitioners wrong, it is unnecessary. Federal Rule of Evidence 706 and 28 U.S.C. § 1920(6) provide for the taxation of the compensation of court-appointed experts. Under these provisions, the trial judge may, at the request of a party or at his or her own volition, appoint expert witnesses to assist the court, including expert witnesses nominated by one of the parties.

Court appointment of a witness nominated by one of the parties can and has been used to establish a statutory basis for later taxation of that witness' compensation as costs, *see, e.g., United States Marshal's Service v. Means*, 741 F.2d 1053, 1057-58 (8th Cir. 1984), and allows the parties to know in advance what costs may be taxed, and to object to unnecessary experts or expenditures.

As the Fifth Circuit pointed out in *International Woodworkers v. Champion Int'l Corp.*, 790 F.2d 1174, 1179 n.6 (5th Cir. 1986) (*en banc*), *cert. pending*, Sup. Ct. No. 86-328, Section 1920(6) acts as a "safety valve." The provision requires advance planning and argument, but certainly it is better for this Court to require a little advance planning than to overturn 130 years of congressional reliance on the meaning of the Fee Act.

IV. PETITIONERS' POLICY REQUEST FOR LEGISLATION HAS REPEATEDLY BEEN REJECTED BY THIS COURT.

Finally, petitioners argue that public policy requires that this Court reverse the court of appeals, so that antitrust plaintiffs will be deterred from bringing suits they may lose. This plea is badly misplaced.

As discussed in detail in Part II *supra*, the antitrust laws were specifically designed to encourage plaintiffs, not to deter them. Congress provided that only antitrust plaintiffs shall recover attorneys' fees, and the courts have consistently held that the antitrust statutes do not allow either plaintiffs or defendants to recover expert witness fees. Petitioners' argument that the court of appeals' decision should be reversed, to deter plaintiffs by making them liable for expert witness fees, is no more than a demand that this Court overturn long-standing congressional policy on antitrust law.

Further, because the law against award of expert witness fees under the antitrust laws is so clear, petitioners' public policy argument must paint with a much broader brush, and ask this Court massively to revise 28 U.S.C. §§ 1920 and 1821, and to hold that in all cases expert witness fees are recoverable as costs. Petitioners argue for an "exception" under which courts would have discretion to award expert fees where the expert's testimony was "essential" to the court's decision. In nearly every case involving economic, scientific, or statistical evidence, however, expert testimony will be "essential." As the Seventh Circuit pointed out in *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 801 F.2d at 911, the exception would swallow the rule.

This Court has repeatedly held that if a revision to the American Rule is to be made, it must be made by Congress. *See, e.g., Alyeska*, 421 U.S. at 263-64; *Summit Valley Industries, Inc. v. Local 112*, 456 U.S. 717, 726

(1982) (refusing to expand NLRA § 303 to allow recovery of attorneys' fees); *F.D. Rich Co. v. United States*, 417 U.S. 116, 128-31 (1974) (no award of attorneys' fees under 40 U.S.C. § 270b(a); issues properly addressed by Congress); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 719-21 (1967) (absent specific statutory language awarding fees, none will be awarded under 15 U.S.C. §§ 1116, 1117). Congress has been clear in its intent for 130 years, and has reaffirmed its understanding in statute after statute. There is no reason for this Court to overturn Congress' decision.

CONCLUSION

Congress has set the public policies concerning the award of private expert witness fees. If petitioners have a plea, it is to Congress for statutory amendments, not to this Court for judicial legislation. The decision of the Fifth Circuit should be affirmed.

DATED this 19th day of February, 1987.

Respectfully submitted,

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